Supreme Court, U. S.
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# Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5116

JACK ROLAND MURPHY,

*Petitioner,*

v.

STATE OF FLORIDA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF FOR THE PETITIONER

HARVEY S. SWICKLE, ESQ.
One Lincoln Road Bldg.
Miami Beach, Florida 33139

*Counsel for Petitioner*

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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## BRIEF FOR THE PETITIONER

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## OPINIONS BELOW

The petitioner advanced his claim of an Unfair Jury Selection and denial of Due Process in a direct appeal to the Appellate Court, Third District, of the State of Florida. The opinion is reported at 252 So.2d 385 (Fla. App. 1971).

The opinion of the United States District Court dismissing the petition for writ of habeas corpus is reported at 353 F. Supp. 1224 (1974). The opinion is also contained in the Appendix at 40.

The opinion of the Court of Appeals for the Fifth Circuit, affirming the District Court's order of dismissal is reported at 495 F.2d 553 (1974) and is contained in the Appendix at 51.

## JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on June 10, 1974. App. at 51. The petition for a rehearing by the Court en banc was denied July 12, 1974. App. at 59.

The Petition for a Writ of Certiorari and Motion to Proceed in Forma Pauperis were docketed August 12, 1974 and granted December 23, 1974.

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

## QUESTION PRESENTED

Whether Petitioner's constitutional right to a fair and impartial trial by Jury was violated by the Court's failure to grant Petitioner's pretrial motion for a change of venue, or to exclude certain prospective jurors because:

A. Each of the jurors examined had obtained knowledge from the news media that the petitioner had been previously convicted of either, breaking and entering or murder in the First Degree.



B. Each juror had been subjected to extensive news media coverage over a period of three years, concerning not only the facts of the crime petitioner was on trial for, but also facts surrounding two murders, and several publicized local and State Investigations dealing with Petitioner being released on bond and being declared incompetent or insane.

## CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the Constitution of the United States of America:

> "... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

The petitioner, Jack Roland Murphy, hereinafter referred to as the defendant, was convicted in The Criminal Court of Record, Dade County, Florida, and sentenced to life imprisonment for Breaking and Entering a dwelling with intent to commit a felony, to-wit: Robbery; and twenty years for Assault with intent to commit a felony, to-wit: Robbery.

By motion, the defendant attempted to change the venue of the trial because of pretrial publicity. The defendant also attempted to excuse all jurors examined who had knowledge of his past criminal convictions.

### 1. The Pretrial Proceedings

On January 8, 1968, the defendant, along with two others were arrested for breaking into the house of Mrs. Olive Wofford and robbing the occupants therein. The case was originally filed as case number 68-530 in the Criminal Court of Record in and for Dade County, Florida.

While case No. 68-530 was pending the defendant, after a lengthy sanity hearing was declared incompetent by the Court. This ruling by the trial court resulted in numerous news articles and the beginning of several state and local investigations into the Court's ruling defendant incompetent. (R. 87-95; 118-121; 126; 134)

Also, while case No. 68-530 was pending, defendant filed a motion for change of venue because of the pretrial publicity (App. 17).

While all of the legal proceedings were taking place in case No. 68-530, the defendant was arrested and indicted for the double murder of Terry Rae Kent Frank and Annalie Mohn. These killings became notorious in the press as the "Whiskey Creek Murders", (R. 86-156).

Because of the trial Court's ruling declaring the defendant incompetent to stand trial, Richard Gerstein, the State Attorney, voluntarily entered a nolle prosequi in case No. 68-530, thereby allowing the Broward County State Attorney to proceed with the "Whiskey Creek Murder Case". (R. 100).

On August 14, 1968, the defendant along with three others were indicted in federal case No. 68-360 CR-JE, with conspiring to transport stolen securities from Los Angeles, California to Miami Beach, Florida. This case was closely related to the "Whiskey Creek Murder case".



On March 1, 1969, the defendant was found guilty of the murder of Terry Rae Kent Frank. On August 25, 1969, the Dade County State Attorney refiled the Wofford robbery charges against the defendant, which case number was 69-7464, and which is the subject matter of the petition before this Court.

In December of 1969, the defendant plead guilty to Count I of the Federal Indictment in case No. 68-360 CR-JE.

On July 17, 1970, the defendant filed a Motion for Change of Venue in the second Wofford robbery case. (App. 30).

### 2. The Jury Selection

On August 27, 1970, the jury selection began. Seventy-eight jurors were questioned by counsel. Of the 78 jurors questioned, the defendant excused 12 pre-emptorily; 27 were excused for either medical, family or economic reasons; 3 were excused for various other reasons; 20 were excused because they had formed an opinion via the news media that the defendant was guilty and they could not render a fair and impartial verdict. The prosecution pre-emptorily excused 8 jurors.

Of the six regular and two alternate jurors selected (none of which were acceptable to the defendant), their knowledge of the defendant, his background and the facts of the case were extensive.

Five of the eight jurors stated that the jury panel had been discussing the defendant and the case and many had formed an opinion that the defendant was guilty.

(App. 158).[1] Six of the eight jurors knew that the defendant had been indicted in the "Whiskey Creek Murder case" and had been convicted of first degree murder. (App. 102, 119). Six of the eight jurors knew that the defendant had previously been a defendant in the theft of the "Star of India and Delong Ruby" from a New York Museum. (App. 60). All of the jurors knew that the Petitioner was a convicted felon and was currently serving time for murder, or had served time for being involved in jewel thefts. (App. 60).

All of the jurors stated that their knowledge of the defendant came from the news media, i.e., radio, television, and newspapers. (App. 60). Four of the eight jurors testified that they had been reading the various articles in the newspapers printed during the week of jury selection. (App. 60). Four of the eight

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[1] Q. Now, did you hear any of the panel, prospective panel, discussing the Murph the Surf case?

A. Sure.

Q. And, would you tell us generally what was the nature of the discussions?

A. Well, it's just – talk.

I would seriously – I would say that I thought that some of the discussions that I overheard, that the people involved with, seriously, from what I heard, made me sick to my stomach.

Q. What were they saying?

A. You know, his guilt or innocence.

I really don't know which people feel that way.

If I believe in the system, I can't believe this.

Q. But tell us what the comments were that caused you to feel sick to your stomach?

A. Like, 'Hang him, he's guilty.' This kind of thing. (App. 158).



jurors were familiar with prior rulings of the Court concerning the controversial ruling over defendant's competency to stand trial. (App. 60).

Prior to and during jury selection, the trial court took no steps to insulate the jury from news coverage of the case. At no time were the prospective jurors instructed not to read or listen to the news or to discuss the case amongst themselves. (App. 90, 100).

After the jury was selected, but prior to their being sworn, defendant renewed his Motion for Change of Venue. In support of the motion, defendant introduced the following exhibits into evidence in support of the motion:

1. Defendant's Exhibit "F" which was an Order dated July 8, 1968, removing the trial of the co-defendants in this case to another county because of the Court's failure to control publicity surrounding the case. (App. 32).

2. Defendant's Exhibit "G" which was a hearing on a Motion to Change Venue in the United States District Court for the Southern District of Florida, Case No. 68-360 dated March 6, 1969. (App. 34).[2]

3. Defendant's Exhibit "H" entitled "Order of Transfer" wherein the United States District Court, on

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[2] The Court. People in this County can tell you who Murphy is, who would not have the slightest idea who Earl Faircloth is, and I think that is a fair statement.

* * * * *

The Court. . . . I am not trying to be funny about it, but it is perfectly obvious, for weeks after the matter with Judge Stedman, his ruling, I could not go to a social event. I would want to sit down and talk about the Dolphins, but everybody there wanted to ask me about Murph the Surf. It was just the topic of conversation (App. ).

April 21, 1970, (more than a year after the hearing set out in footnote 2, and just three months prior to the trial in the case sub judice), transferred case No. 68-360 to Pensacola, Florida for trial.

Notwithstanding all of the exhibits and the difficulty in selecting an impartial jury, the trial court denied the motion to change venue, as well as the motion to exclude jurors with knowledge of the defendant's past criminal record. (TR. 1493).

### 3. The Verdict And Appeals

On August 21, 1970, the jury found Murphy guilty on both counts of the information. The Court imposed a sentence of life on one count and twenty years on the other count. (R. 2656).

Murphy appealed his conviction to the District Court of Appeals of Florida, Third District. He urged the Court to order a new trial based upon the selection of a prejudiced jury and that his constitutional right to a fair and impartial trial by jury was violated. The Appellate Court affirmed the conviction and sentences. *Murphy v. State*, 252 So. 2d 385 (Fla. App. 1971) (App. 5).

On January 28, 1973, Murphy filed a Petition for Writ of Habeas Corpus in the United States District Court Southern District of Florida, contending that he was denied due process of law by the trial court's failure to grant his pretrial motion for change of venue or to exclude jurors with knowledge of defendant's criminal record. The District Court rejected Murphy's contention. *Murphy v. State*, 363 F. Supp. 1224 (1974) Murphy then filed Motion for leave to Proceed in



Forma Pauperis and for a certificate of probable cause. The United States District Court granted both. The Notice of Appeal was then filed with the United States Court of Appeals for the Fifth Circuit. The United States Court of Appeals for the Fifth Circuit affirmed the Judgment of the District Court. *Murphy v. State*, 495 F.2d 553 (1974). Murphy then filed this Petition for Certiorari in the Supreme Court of the United States which Petition was granted on December 23, 1974.

## ARGUMENT

### I.

### PETITIONER'S CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL TRIAL BY JURY WAS VIOLATED BY THE COURT'S FAILURE TO GRANT A PRETRIAL MOTION FOR CHANGE OF VENUE, OR TO EXCUSE FOR CAUSE JURORS WHO HAD LEARNED FROM THE NEWS MEDIA THAT PETITIONER WAS A CONVICTED FELON.

A trial by jury in a criminal case is fundamental to the American scheme of justice, and the Fourteenth Amendment to the United States Constitutional guarantees both a right of jury trial in all criminal cases, *Duncan v. State of Louisiana*, 391 U.S. 145 (1968), and a right to a jury trial with a jury which is fair and impartial. *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

As reflected by the Record and Appendix in this case the eight jurors who convicted the defendant, knew he had been convicted of either a jewel theft, murder, or

possession of stolen securities and that during the trial he was incarcerated in a state prison. Persons who obtain such knowledge from the news media cannot fairly and impartially sit as jurors in a criminal case.

### A. Admissibility of An Accused's Criminal Record And The Prejudicial Nature of Such Evidence

Under Florida law the only proper way of introducing prior convictions is in an attempt to impeach or discredit the defendant's character, should he offer evidence in his own behalf at the time of trial. *Florida Statutes*, § 90.08 and Florida Rules of Evidence, § 99 (1967). The same rule applies in the Federal Courts. *Davis v. United States*, 413 F.2d 1226 (5th Cir. 1969) and *United States v. Stallings*, 437 F.2d 1057 (5th Cir. 1971). The reason for the rule is quite evident. Information of prior convictions is extremely prejudicial to the accused. Jurors are permitted to have knowledge of such facts only under limited situations. The prejudicial nature of such information was expounded upon by this Court in *Marshall v. United States*, 360 U.S. 310 (1959). In *Marshall, supra*, the defendant was charged with unlicensed dispensing of drugs. During the trial, defendant never took the witness stand. Also during the trial, newspaper articles containing information about the defendant's past criminal record reached members of the jury. In reversing the conviction, the Court said: (at 360 U.S. 313-314).

> "... we have the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great, when the evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence ..."



The defendant is well aware that in *Marshall v. United States, supra*, the Court's action was taken in that direct criminal appeal pursuant only to its inherent supervisory powers and not in terms of due process standards. The United States Court of Appeals for the Fifth Circuit in affirming the decision of the United States District Court, incorrectly distinguishes *Marshall v. United States, supra*, on this point.[3] This portion of the Court's opinion fails to take into consideration the decisions of this Court and of the other United States Courts of Appeals since the ruling in *Marshall v. United States, supra*.

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[3] Although the situation in Marshall is factually similar to the instant case, the rationale of that opinion militates against Petitioner's position. The Court, then, finds that a trial by jurors, each of whom has obtained knowledge of a defendant's past felony convictions through pretrial publicity, does not, in light of the Supreme Court's refusal to so find, raise to constitutional proportions when each juror has satisfied the impartiality requirements set forth in *Irvin v. Dowd, supra*. The Court recognizes that the distinction between acts or occurances which warrant the exercise of federal supervisory powers and those which reflect the denial of due process is often a nebulous one. Nevertheless, the dictates of federalism compel this court to abide by the distinction whenever it exists. Petitioner's claim regarding the effect of pretrial publicity must fall. (App. 57).

**B. A Defendant Need Not Show Prejudice And Jurors Mere Assurances Of Impartiality Is Not Sufficient Where They Have Learned From News Media Of Accused's Prior Criminal Record.**

Prior to 1959, the federal courts applied the same standards in prejudicial publicity cases, whether the case arose in either the state or federal courts. That rule required an actual showing of prejudice by the defendant. However, in 1959, *Marshall v. United States, supra,* as previously quoted, changed that rule but only in the federal courts, holding that even though jurors stated they would not be influenced by prejudicial articles, the court reversed on the basis that the publicity of past criminal record in and of itself was so prejudicial that it required reversal of the petitioner's conviction.

In *Irvin v. Dowd,* 366 U.S. 717, 728 (1961) this Court reaffirmed the view announced in *Marshall v. United States, supra,* to-wit; that prejudicial infection of a jury is not cured by statements of the individual jurors that they "would be fair and impartial to petitioner". It should be pointed out that the publicity dealing with the defendant's past criminal record was also cited by the Court in *Irvin v. Dowd,* 366 U.S. 725.[4] Of importance also is the fact that in *Irvin v. Dowd, supra,* the Court was not dealing with a federal criminal prosecution, but was before the Court as a result of a habeas corpus petition filed by a state prisoner.

[4]"These stories revealed the details of his background, including a reference to crimes committed when a juvenile, his convictions for arson almost 20 years previously, for burglary and by a court-martial on A.W.O.L. charges during the war. . . ."



In *Rideau v. Louisiana,* 373 U.S. 723, 727 (1963), which was another state court action, the court found that it was not necessary to show actual prejudice, and furthermore, it was not even necessary to show that the prejudicial material had ever reached the entire jury panel. If information was prejudicial and widespread in the community, the defendant without ever making an actual showing of jury prejudice was entitled to a change of venue.

In *Estes v. Texas,* 381 U.S. 532 (1965) this court held that use of television cameras in a courtroom deprived the defendant of his Sixth Amendment right to a public trial even though prejudice could not be shown. In other cases, the Court noted (at 381 U.S. 543) it

> did not stop to consider the actual effect of the practice but struck down the conviction on the basis that prejudice was inherent in it

Through these decisions, this Court has consistently rejected the principal that an accused must show actual prejudice on the basis that prejudice is often difficult if not impossible to prove.

This principal has been applied not only in pretrial publicity cases involving a denial of a change of venue, but also in cases where other constitutional rights have been involved. For example, where a defendant had been denied the right to counsel at arraignment, the Court in *Hamilton v. Alabama,* 368 U.S. 52, rejected the rationale of the lower court denying relief that the accused was not disadvantaged in any way by the absence of counsel. This Court said (at 368 U.S. 55).

> When one pleads to a capital charge without the benefit of counsel, we do not stop to determine

whether prejudice resulted. *William v. Kaiser*, 323 U.S. 471, 475-476; *House v. Mays*, 324 U.S. 42, 45-46, *Uveges v. Pennsylvania*, 335 U.S. 437, 442. In this case, as in those, the degree of prejudice can never be shown.

The rationale for presuming prejudice occurs because of the great difficulty of proving actual prejudice and is necessary for the protection of constitutional rights.

Justice Brennan stated in *Dicky v. Florida*, 398 U.S. 55 (concurring Opinion)

> Because concrete evidence that their denial caused the defendant substantial prejudice is often unavailable, prejudice must be assumed, or consitutional rights will be denied without remedy.

In June of 1966, this Court decided the case of *Sheppard v. Maxwell*, 384 U.S. 333 (1966). The Court concluded that Sheppard did not receive a fair trial consistent with the due process clause of the Fourteenth Amendment and, therefore, reversed the judgment. Although the pretrial publicity in *Sheppard v. Maxwell, supra*, did not deal with past criminal convictions, the Court in its dictum made the following comments concerning its earlier opinion in *Marshall v. United States, supra*, at pages 350-351:

> . . . freedom of discussion should be given the widest range compatible with the essential requirements of the fair and orderly administration of justice. *Pennykamp v. State of Florida*, 328 U.S. 331, 347, 66 S. Ct. 1029, 1037, 90 L.Ed. 1295 (1946). But it must not be allowed to divert the trial from the 'very purpose of a court system . . . to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom accordng to legal procedures.' *Cox v. State of Louisiana*, 379 U.S. 559, 583, 85



> S.Ct. 466, 471, 13 L.Ed.2d 487 (1965) (Block, J., dissenting). Among these 'legal procedures' is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources. Thus, in *Marshall v. United States*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed. 2d 1250 (1959), we set aside a conviction where the jurors were exposed 'through news accounts' to information that was not admitted at trial. We held that the prejudice from such material 'may indeed be greater' than when it is part of the prosecution's evidence 'for it is then not tempered by protective procedures.' At 313, 79 S.Ct. at 1173. At the same time we did not consider dispositive the statement of each juror 'that he would not be influenced by the news articles that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner, as a result of the articles.'. . .

In *United States, ex rel. Doggett v. Yeager*, 472 F.2d 229, 237 (3rd Cir. 1973) the Third Circuit Court of Appeals affirmatively recognized that *Marshall v. United States, supra*, no longer was applicable only to federal cases.

> . . . *Marshall v. United States, supra*, while factually controlling in this case, is distinguishable on the ground that involved the Supreme Court's supervisory power over a lower federal court rather than its constitutional power to enforce the Fourteenth Amendment's due process standards. But soon after 1959, it became clear that the former rule was no longer applicable in state trials. . . .

The Fifth Circuit Court of Appeals in its opinion in this case recognized that said opinion was in conflict with the view announced in *United States ex rel.*

*Doggett v. Yeager, supra,* (at page 4659, footnote 4).[5]

In *United States v. Isaacs,* 351 F.Supp. 1323 (N.D. Ill. E.D. 1972), the District Court reached the same decision as the Court in *United States, ex rel. Doggett v. Yeager, supra,* reached two years later, holding that "we view Sheppard as an application of the rule of *Marshall v. United States*" at page 1328.

It is clear that the opinion of the United States Court of Appeals for the Fifth Circuit in the instant case is diametrically opposed to the opinion of the United States Court of Appeals for the Third Circuit in *United States, ex rel. Doggett v. Yeager, supra.*

The rationale of the decisions cited above militates against the opinion of the Court of Appeals for the Fifth Circuit. These cases clearly establish a line of decisions beginning with *Marshall v. United States, supra,* which hold that where jurors have learned from the news media of defendant's criminal record and background; that knowledge precludes them from sitting as jurors and the Court should either excuse them from service or grant a change of venue. This action should be taken notwithstanding the jurors assurances of fairness and impartiality, and notwithstanding a failure to show actual prejudice.

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[5] We are aware of the view announced in *United States, ex rel. Doggett,* 3 Cir. 1973, 472 F.2d 229, 237-239, that *Irvin v. Dowd, supra,* and *Sheppard v. Maxwell, supra,* broadened the *Marshall* holding so as now to require that its rule be applied in state trials. While the question arose in a prejudicial publicity-change of venue setting in *Doggett,* we do not seriously doubt that the Third Circuit would apply its holding equally in a situation involving, as presently under discussion, denials of challenges for cause based on a jurors knowledge of prior convictions. With deference, we disagree with our sister circuit's conclusion and decline here to be guided by *Doggett.*



Furthermore, the opinion of the Court of Appeals in the case sub judice, fails to consider the opinion of *Duncan v. State of Louisiana,* 391 U.S. 145 (1968), wherein this Court stated that a trial by jury in criminal cases is fundamental to the American scheme of justice, and that the Fourteenth Amendment to the United States Constitution guarantees a right of jury trial in all criminal cases which, were they to be tried in a federal court, would come within the Sixth Amendment guarantee. By its opinion in *Duncan v. State of Louisiana, supra,* this Court has made applicable in all state criminal jury trials those rules applicable in federal criminal jury trials.

Thus, the rationale of both *United States, ex rel. Doggett v. Yeager, supra,* and *United States v. Isaacs, supra* is reinforced by the opinion in *Duncan v. State of Louisiana, supra.*

## II.

**PETITIONER'S CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL TRIAL BY JURY WAS VIOLATED BY THE COURT'S FAILURE TO GRANT A PRETRIAL MOTION FOR CHANGE OF VENUE, OR TO EXCUSE FOR CAUSE JURORS WHO HAD BEEN SUBJECTED TO EXTENSIVE NEWS MEDIA COVERAGE OF THE CASE WHICH WAS BEING TRIED AS WELL AS FACTS SURROUNDING TWO MURDERS AND SEVERAL INVESTIGATIONS DEALING WITH PETITIONERS BEING RELEASED ON BOND AND BEING DECLARED INCOMPETENT.**

The record before this Court amply documents the nature and extent of the pretrial publicity in both the

case at bar as well as the murder case and federal securities case. The record shows that over a period of two and one-half years, the publicity concerning the defendant was extensive and prejudicial. Defendant would agree with that portion of the Fifth Circuit opinion wherein the Court stated that there was a substantial period of time where there had been no publicity concerning the defendant (App. 56). However, the Court's contention that this time span was an important factor in finding no prejudice is not in accord with the testimony of the jurors. Each of the jurors questioned had excellent recollection of all the events surrounding Murphy's past criminal exploits and also of the various legal conflicts which occured during the pretrial proceedings in this case.

In the present case, the motion for change of venue which was filed with the state trial court did not evolve around the sole fact that the news media published accounts of the case. The factual matters which established the necessity for change of venue were:

1. The news media's earlier attack on the trial court judge for reducing the Defendant's bond in the first case which was filed, tc wit: Case Number 68-530. (R. 26).

2. The news media's earlier prejudicial reporting concerning the state trial court's ruling declaring the defendant incompetent in Case Number 68-530. There was such a public outcry over said ruling that several highly publicized investigations were conducted at both the state and county level. (R. 92-97).

3. The news media's continued reporting of Defendant's past criminal life and convictions.

4. The trial court's complete failure to make any attempt to control the publicity so as not to prejudice



the defendant. In fact, the trial court sought publicity because the judge was running for re-election. This is evident by the fact that the trial judge continued or transferred all of his other cases with the exception of defendant's case and that of the also highly publicized Charles Celona case. In fact, the judge was trying both cases at the same time, devoting the mornings to defendant's trial and the afternoons to the Celona trial.

The fact that the trial court took no steps to control publicity was readily shown by the court's earlier order of July 8, 1969, concerning the trial of the two co-defendants in the within cause (App. 32). The state trial court citing *Sheppard v. Maxwell, supra,* admitted that he had failed to control publicity which had saturated the community, and therefore changed the venue for those two co-defendants. Furthermore, at no time either prior to or during the jury selection, did the trial court take any steps whatsoever to control what the jurors read, said or did concerning Jack Roland Murphy.

In *Sheppard v. Maxwell,* 384 U.S. at 362-363, the Court discussed the protection which must be afforded to a defendant in a criminal case.

> . . . due process requires that the accused receive a trial by an impartial jury free from outside influence. Given the pervasiveness of modern communications and the difficulty of affecting prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to insure that the balance is never weighed against the accused. . . . where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates or transfer it to another county, not so permeated with publicity. . . . (citation omitted).

Above and beyond, the trial court's failure to take steps to protect the defendant, is the actual knowledge of each of the individual jurors involved. The Statement of the Case in this brief as well as the record now before this Court clearly establishes each jurors' familiarity with the defendant, notwithstanding the fact that a substantial portion of the publicity surrounding the petitioner had occurred months prior to the actual trial of the within cause. In *United States, ex rel. Bloeth v. Denno,* 313 F.2d 364 (2nd Cir. 1963), the Court in a case similar to the case at bar held:

> "We have examined the record, including *voir dire* examination of the jurors challenged or excused, which was not before Judge Cashin. His conclusion that lack of impartiality of the trial jury had not been established appears to us clearly erroneous. Jury impartiality must be measured by the standards established by the Supreme Court in the line of cases culminating in *Irvin v. Dowd* . . . . Applying these rules to the facts of that case, however, it was made plain that merely going through and obtaining the jurors' assurances of impartiality is insufficient. The reviewing court must determine from a review of the entire *voir dire* whether the extent and nature of the publicity had caused such a build up of prejudice that excluding the preconception of guilt from the deliberations would be too difficult for the jury to be honestly found impartial."

As shown from the breakdown of the jurors' statements (App. 60-186) the jury had sufficient knowledge of this case, including the controversial ruling concerning bond and the defendant's sanity, as well as defendant's past criminal background so as to permit an assumption that potential substantial prejudice was evident from these facts. *United States v. Wade,* 388



U.S. 218, 227; *Dicky v. Florida,* 398 U.S. 55 (concurring Opinion of Justice Brennan). The comments of one particular juror amply sets forth the demeanor and thoughts of the jury panel. (See footnote 1, page 6 of the brief).

Comments such as this as well as the examination of all the jurors clearly reflect that the possibility of obtaining a fair and impartial jury in light of all of the publicity surrounding Murphy, as well as each juror's knowledge of Murphy's past criminal convictions was practically non-existent notwithstanding assurances of impartiality.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of Court below be reversed, that the Court order the conviction of Defendant be vacated and that the cause be remanded back to the state trial court for a new trial.

Respectfully submitted,

HARVEY S. SWICKLE, ESQ.
One Lincoln Road Building
Suite 219
Miami Beach, Florida 33139
*Counsel for Petitioner*